HONG LEONG FINANCE BHD

v.

DELTA DRIVE (M) SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
SULONG MATJERAIE JC
[COMPANIES WINDING-UP NO: 28-238 OF 1998]
24 MARCH 1999

CIVIL PROCEDURE: *Affidavits - Affidavit verifying petition - Whether sworn and filed after petition pursuant to r. 26 of Companies (Winding-up) Rules 1972 - Whether non-compliance a mere irregularity - Whether curable - Companies (Winding-up) Rules 1972, rr. 193, 194 & Companies Act 1965, s. 221(2)*

COMPANY LAW: *Winding-up - Petition - Affidavit verifying petition - Whether sworn and filed after petition - Whether complied with r. 26 of Companies (Winding-up) Rules 1972 - Whether non-compliance a mere irregularity - Whether curable - Companies (Winding-up) Rules 1972, rr. 193, 194 & Companies Act 1965, s. 221(2)*

The petitioner, Hong Leong Finance Bhd, applied to this court to have Delta Drive (M) Sdn Bhd ('the company') wound up. However, the company raised a preliminary objection in that the petition to wind up the company and the affidavit verifying the petition were both dated 26 November 1998 and as such there was a failure to comply with r. 26 of the Companies (Winding-up) Rules 1972. According to the said rule, the affidavit verifying the petition shall be sworn after and filed within four days after the petition is presented.

Held:

[1] Without any evidence, the company's contention that the affidavit verifying the petition was sworn earlier than the petition as both were filed on the same day, could not be accepted. Further, r. 26 would not be breached if the petition was filed in the morning and the affidavit verifying the petition was filed in the afternoon on the same day. As no evidence was adduced, no decision could be made on that basis.

[2] As the affidavit verifying the petition refers to the petition as discerned from the wordings in para 2 of Form 7 of the affidavit, it followed that the affidavit could only be sworn after the petition. Further, no evidence was adduced to the contrary.

[3] The premature swearing or affirming of an affidavit verifying petition is a mere irregularity curable under r. 193 of the Companies (Winding-Up)

Rules 1972. Apart from the discretionary power given by rr. 193 and 194 of the said Rules, s. 221(2) of the Companies Act 1965, allows the court to cure the "technical error" which does no injustice to the respondent. This can be rectified by a re-swearing of the affidavit and the order sought by the petition can be made thereafter.

[4] In this instance, the premature swearing or affirming of the affidavit verifying petition on 26 November 1998 was a mere irregularity and curable as no injustice had been done to the company. The petitioner was ordered to reaffirm or reswear the same affidavit within 10 days with costs to the company.

[Order accordingly.]

Reported by Usha Thiagarajah

Case(s) referred to:
Chin Yoon Timber Company v. Overseas Lumber Bhd [1978] 2 MLJ 173 ***(refd)***
Ooi Thean Chuan v. Banque Nationale de Paris [1992] 2 CLJ 1225 ***(refd)***
Re Harrison [1904] 22 NZLR 864 ***(refd)***
Re Mohd Sharif bin Sapie ex p Malayan Banking Bhd [1992] 2 MLJ 102 ***(refd)***
Re Sutherland Manure Co Ltd [1893] 11 NZLR 460 ***(refd)***
Sam Hin Timber Trading Co v. Perusahaan Sri Duyung Sdn Bhd [1983] 2 CLJ 269 ***(refd)***
Sari Atlantic Sdn Bhd v. Aik Kim Enterprise [1988] 1 MLJ 201 ***(refd)***
Sobri bin Arshad v. Associated Tractors Sdn Bhd [1991] 1 CLJ 798 ***(refd)***
Western Benefit Building Society [1864] 33 BEAV 368 ***(refd)***
YPJE Consultancy Services Sdn Bhd v. Heller Factoring (M) Sdn Bhd [1996] 3 CLJ 51 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 131
Companies Act 1965, s. 221(2)
Companies (Winding-up) Rules 1972, rr. 26, 29, 32(1), 193, 194

Bankruptcy Act 1892 [New Zealand], s. 166

Other source(s) referred to;
English and Empire Digest, 1975, Replacement vol 10, p 959 (reissue), case 5667
English and Empire Digest, Scottish, Irish and Commonwealth Cases, vol 9, case 2732

For the petitioner - Saw Kim Hong; M/s Iqbal Hakim Sia & Voo
For the respondent - TS Chang; M/s Henry Soong & Chang
For the supporting creditors - Clarence Edwin; M/s Abdul Rahman Saad & Assoc
Manjit Kaur; M/s Nora SW Lam & Assoc

Reported by Usha Thiagarajah

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JUDGMENT

Sulong Matjeraie JC:

A petition was presented to this court to wind up Delta Drive (M) Sdn Bhd (the company). The company has an authorised capital of RM500,000 divided b into 500,000 shares of RM1 each. Its paid up capital is RM25,000. The company is alleged to be indebted to the petitioner for a sum of RM3,908,806.31 calculated as at 26 January 1998.

There were two supporting creditors Sin Kian Contractor (M) Sdn Bhd and Wei Sin Construction Sdn Bhd, both for allegedly substantial amount. They c have handed over Form 9 as required by r. 29 Companies (Winding-up) Rules 1972, to the court, on 22 February 1999 listing the names and addresses of persons who have given notice of their intention to appear.

The counsel for the company served onto the counsel for the petitioner a letter d dated 10 February 1999 enclosing a copy of their Notice Of Intention To Appear on Petition. It was further stated therein that they would wish to put the petitioner's counsel on notice that they intend to raise a preliminary objection to the said petition. To this the petitioner's counsel replied pointing out Bar Council Rulings 1997 Part (H) cl. 19c requesting for details of the e objection.

Counsel for the company responded on 12 February 1999 notifying them that the preliminary objection was on the non compliance with r. 26 of the Companies (Winding-up) Rules 1972.

f The petition was heard before this court on 22 February 1999 and Miss Saw Kim Hong learned counsel for the petitioner raised objection to the preliminary objection alleging that the letter from the respondent was not a good notice. Further it was also argued that as their firm was closed for one week from 15 February 1999 to 20 February 1999 for Chinese New Year holidays it did g not offer them sufficient time to prepare her case.

This court overuled the objection and allowed Mr. TS Chang learned counsel for the company to proceed with his submission on his preliminary objection and allowed counsel for the petitioner to submit further on 13 March 1999.

h The objection revolves round r. 26 of the Companies (Winding-up) Rules 1972 which states:

> Every petition for the winding-up of a company by the court shall be verified by an affidavit referring thereto. The affidavit in Form 7 shall be made by the petitioner or by one of the petitioners, if more than one, or, in case the i petition is presented by a corporation, by some director, secretary or other

principal officer thereof and **shall be sworn after and filed within four days after** the petition is presented, and the affidavit shall be *prima facie* evidence of the statements in the petition (emphasis is mine).

It was well argued by learned counsel for the company that since the affidavit and the petition were both dated 26 November 1998 it failed to comply with the provision of r. 26 Companies (Winding-up) Rules 1972 which requires that the petition shall be sworn after and filed within four days after the petition is presented. The case of *Chin Yoon Timber Company v. Overseas Lumber Bhd* [1978] 2 MLJ 173 (*Chin Yoon Timber*) was adduced as his authority.

This court regrets that it cannot accept this authority as, unlike the instant case, the facts of *Chin Yoon Timber* indicated that the petition to wind up was presented on 17 May 1977 whereas the affidavit verifying the petition was sworn on 4 May, some 13 days before the presentation of the petition. Syed Othman J (as his Lordship was then) with great respect, correctly struck out the petition but allowed a fresh petition to be filed.

The affidavit filed before the petition cannot therefore be said to relate to any proceedings.

The Court of Appeal held in the case of *YPJE Consultancy Services Sdn Bhd v. Heller Factoring (M) Sdn Bhd* [1996] 3 CLJ 51; [1996] 2 MLJ 482 that where both the affidavits and petitions contained the same date of 10 July 1995, the trial judge was correct in stating that r. 26 of the Companies (Winding-up) Rules had not been infringed because the affidavit that verified the petition had been filed on 11 July 1995.

The learned counsel for the company tried to distinguish the instant case and the case of *YPJE Consultancy Services Sdn Bhd v. Heller Factoring (M) Sdn Bhd (supra)* where it was suggested r. 26 was not breached because the affidavit that verified the petition was filed a day later whereas in the instant case the affidavit verifying petition and the petition were dated the same day. Since the affidavit could not have been filed if it was unsworn, the learned counsel argued therefore that the affidavit must have been sworn earlier.

When requested by this court if the learned counsel has any evidence to prove this, the answer was in the negative. It was argued further that since the affidavit was filed together with the petition, the implication, was that the affidavit was sworn earlier.

This court regrets that without any evidence, it is unable to accept the contention that the fact that the petition and the affidavit were filed the same day it must necessarily follow that the affidavit verifying the petition have been sworn earlier.

It is the view of this court that r. 26 would not be breached if the petition is filed in the morning and the affidavit verifying the petition is filed in the afternoon on the same day. No evidence was adduced in this court on this instant case and as such it is unable to decide on that basis.

It should also be noted that r. 26 requires that the affidavit in Form 7, shall be made by the petitioner. In the first schedule of the Companies (Winding-up) Rules 1972 there are more than 95 forms for general use in respect of winding up matters.

Rule 3(1) Companies (Winding-up) Rules 1972 says:

> for the purpose of these Rules the forms prescribed in the First Schedule, where applicable, and where they are not applicable, forms of the like character, with such variations as circumstances may require, may be used.

Rule 3(2) says:

> where the forms are applicable any costs occasioned by the use of any other forms not prescribed shall unless the court otherwise directs be borne by the party using such other forms.

It appears therefore that most, of it not all, the forms to be used under Companies Winding-Up are prescribed in the said first schedule.

Under r. 26 there are two types of Form 7. One is for use if the petition is by an individual or a firm and the other one is for use if the petition is by a limited company. In this case, the second form was being used. There is no problem with that. The deponent was Mr. Yau Yin Wee, the senior manager of the southern region of the petitioner's company. Being the principal officer the making of affidavit was not therefore disputed by the learned counsel of the company.

What is more interesting to observe here is that the second paragraph of the affidavit verifying petition says as follows:

> (2) Such of the statements in the petition now produced and shown to me marked with the letter 'A' as relate to the acts and deeds of the said petitioner are true and such of the statements as relate to the acts and deeds of any other person or persons I believe to be true.

These are *verbatim et literatim* to those found in para. (2) of Form 7 in respect of the petition filed in this court by the petitioner in this instant case. Similarly para. 1 complies rigidly to para. 1 of Form 7 of the first schedule.

It is obvious that the affidavit verifying petition refers to "such of the statements in the petition now produced and shown to me marked with the letter 'A' as relate to the acts and deeds of the said petitioner are true ...".

Such being the case, it is the finding of this court that the affidavit could only be sworn after the petition has been prepared. This finding is supported by the decision in the Court of Appeal case of *YPJE Consultancy Services Sdn Bhd v. Heller Factoring (M) Sdn Bhd (supra)* where it was held that the trial judge was correct for holding that the affidavit was made after the petition was presented, as the affidavit referred to the petition which was attached to the affidavit.

As to when the affidavit was filed, it rests on the evidence brought before this court. No such evidence was forthcoming except for the contentions stated earlier.

Neither Puan Azizah Hasan nor Encik Presanth representing the office of Pegawai Penerima who came on 22 February 1999 and 13 March 1999 respectively objected to the petition. Both of them said on two separate occasions, apart from the fact that the petition was not dated, they observed that the papers were in order.

Registrar's certificate had been issued by the Registrar on 8 February 1999 pursuant to r. 32(1) of the Companies (Winding-up) Rules 1972.

As regards the actual date of the petition the learned counsel for the petitioner said that the date of filing, i.e 26 November 1998 shall be the date of the petition. This was accepted by this court.

It is therefore necessary now to determine if the affidavit verifying petition dated the same day as the petition breached r. 26 if it is filed the same day as the petition.

Affidavit Shall Be Sworn After And Filed Within Four Days The Petition Is Presented

The above wordings of r. 26 Companies (Winding-up) Rules 1972 suggest that every petition for winding-up of a company by the court shall be verified by an affidavit referring thereto.

The affidavit in Form 7 shall be made by the petitioner and shall be sworn after and filed within four days after the petition is presented.

Based on the earlier finding that because of the wording of para. 2 of the Form 7 is standard, the affidavit verifying petition could only be sworn after the petition. No evidence to the contrary was brought to the attention of this court.

It would appear that because of the wordings of r. 26, the petition and the affidavit verifying petition cannot be filed contemporaneously. The affidavit shall be sworn **after** and **filed** within **four** days after the petition is presented.

Learned counsel for the petitioner said that the phrase "shall be sworn" "cannot prevent the court causing the omission to be rectified under s. 166 and to treat it as immaterial irregularity only." She adduced the case of *Re Harrison* [1904] 22 NZLR 864 as elaborated in the judgment of Edgar Joseph Jr J (as his Lordship was then) in *Ooi Thean Chuan v. Banque Nationale de Paris* [1992] 2 CLJ 1225, [1992] 2 MLJ 526 @ p. 530.

Whilst the learned counsel for the petitioner said she has no copy of the case of *Re Harrison (supra)* this court is also unable to secure the full report and it is unwise to use an extract from another judgment as a basis at arriving at a decision without having the benefit of reading the full case from New Zealand. Suffice it to say here that whilst *Re: Harrison (supra)* involves s. 166 Bankruptcy Act 1892 (equivalent to our s. 131 Bankruptcy Act 1967) on formal defect not to invalidate proceedings, this instant case relates to winding up of a company.

As no full authority is produced, this court has no other alternative but not to consider the merit of her argument.

Effect Of Non-compliance Of R. 26

It is to be observed that in *Chin Yoon Timber (supra)* it was the view of the court that the affidavit verifying the petition which was sworn before the presentation of the petition cannot be said to relate to any proceedings. Extending what the Master of the Rolls said in *Western Benefit Building Society* [1864] 33 BEAV 368 The English Reports Vol. LV Rolls Court VIII the learned Syed Othman J (as his Lordship was then) said "you cannot verify to an unborn petition; a petition comes to life only when presented. The underlying general principle governing an affidavit is that it must be made in some cause or matter which is actually pending in court." As such it was his Lordship's view that r. 193 cannot apply to the first affidavit in the said case. Although the petition was struck out but a fresh petition was allowed to be filed and cost to the respondent. Peh Swee Chin J (as his Lordship was then) in *Sam Hin Timber (supra)* argued that the learned judge exercised his discretion, in not allowing an extension of time, because, *inter alia*, the learned judge appears to have taken a dim view of the petitioners there filing a second affidavit without leave during an adjournment expressly granted to look up for authorities.

In order to enable us to analyse the case of *The Western Benefit Building Society (supra)* it is felt imperative to reproduce the brief report in full hereunder:

> [368] The Western Benefit Building Society Jan 19, 1864.
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> An affidavit in support of a petition to wind up sworn before the presentation of the petition is ineffectual, and it must be resworn before an order can be made on the petition.
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> The 4th of the General Orders of 11th November 1862 (32 LJ (Chanc) 4), made under the Companies Act 1862, directs that the affidavit verifying the petition for winding up any company "shall be sworn after and filed within four days after the petition is presented." In this case, an order had been made on the 16th of January to wind up this Company, but it was found that the affidavit in support of the petition had, inadvertently, been filed before instead of after the filing of the petition.
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> Mr Roxburgh now brought the matter to the notice of the Court, and stated that the error had arisen from the old practice, which was, to annex the affidavit to the petition and which therefore required it to be sworn before the filing of the petition; 12 & 13 Vict.c 108, S.3. The MASTER OF THE ROLLS [Sir John Romilly].
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> *This affidavit amounts to nothing; it must be resworn and the order dated subsequently.*

The words used by Sir John Romilly MR, in its plain and ordinary meaning suggest that the affidavit amounted to nothing and it (the affidavit) must be resworn and the order dated subsequently.

As VC George J (as his Lordship was then) said in *Re Mohd Sharif Bin Sapie ex p Malayan Banking Bhd* [1992] 2 MLJ 102 @ p. 105, "clearly he (Sir John Romilly MR) found nothing wrong with the petition itself and was of the opinion that the omission of an affidavit sworn in terms required by the rule could be rectified by a reswearing of the affidavit and that the order sought by the petition could be made thereafter."

This court respectfully shares the same view of the learned presiding judge in *Re Mohd Sharif Bin Sapie (supra)*. Further, r. 193 and r. 194 allow this court to extend the time.

This court takes comfort that the decision of the learned Peh Swee Chin J (as his Lordship was then) in *Sam Hin Timber Trading Co v. Perusahaan Sri Duyung Sdn Bhd* [1983] 2 CLJ 269 seem to reflect the same sentiment where a petition for the winding up of Perusahaan Sri Duyung Sdn. Bhd was presented on 24 March 1983 but the affidavit verifying the petition was

affirmed on 8 March 1983. There was non compliance of r. 26. Application was made by the petitioner for extension of time for filing such affidavit, that is for leave to reaffirm and reswear the same affidavit. The company opposed the application. It was held that the court has the power to extend the time asked for under r. 193 and r. 194 of the Companies (Winding-up) Rules. The learned judge further said that the premature swearing or affirming of such an affidavit is a mere irregularity curable by granting an extension of time and compensating the victim with costs. Rule 193 confers a discretion on the court to allow extension of time.

The learned Lim Beng Choon J in *Sari Atlantic Sdn Bhd v. Aik Kim Enterprise* [1988] 1 MLJ 201 said at p. 202 that non compliance with r. 26 does not render the petition a nullity and is curable by the court. His Lordship also quoted an authority appearing in the *English and Empire Digest* Replacement Vol. 10 1975 reissue at p. 959 case 5667 where it stated as follows:

> An affidavit in support of a petition to wind up sworn before the presentation of the petition is ineffectual and it must be resworn before an order can be made on the petition.

Another authority offered by the learned counsel for the petitioner was *English and Empire Digest* Vol. 9 *Scottish, Irish And Commonwealth Cases*, case No. 2732 where it was held that where a verifying affidavit is sworn before, instead of after, the petition is filed, the court would probably get over the difficulty if that were the only ground of objection – *Re Sutherland Manure Co Ltd* [1893] 11 NZLR 460 – decision of the New Zealand Supreme Court.

Edgar Joseph Jr J (as his Lordship was then) in *Sobri Bin Arshad v. Associated Tractors Sdn Bhd* [1991] 1 CLJ 798 noted the New Zealand's case of *Re Sutherland Manure Co Ltd (supra)* and said at p. 800 that the learned judge in that case "made the chance and somewhat inconclusive remark – doubtless by was of *obiter dictum*:

> If however, that were the only other objection to the petition, probably the court might in some way or other get over the difficulty which the petitioner has created for himself by neglecting the rule.

His Lordship however took a contrary view and preferred to follow the other authorities which his Lordship had cited earlier.

Learned counsel for the company submitted *Sobri Bin Arshad* case *(supra)* as an authority but this court feels that since the said case relates to a bankruptcy proceeding, where no time frame is prescribed for the swearing and filing of the verifying affidavit, this court, with the greatest respect feel that the other authorities outlined earlier would be more appropriate to follow.

Unlike the cases quoted earlier where the affidavit verifying petition was affirmed very much earlier than the petition being presented, in this instant case, the affidavit verifying petition was presented on the same day as the petition. At worse contemporaneously.

Learned counsel for the petitioner argued that there was no injustice caused to the company. She also referred to rr. 193 and 194 of the Companies (Winding-up) Rules giving necessary power to the court. For easy reference rr. 193 and 194 are appended here under:

> 193. The court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the court for doing any act or taking any proceeding.
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> 194. (1) No proceeding under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court.
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> (2) No defect or irregularity in the appointment or election of a receiver, liquidator or member of a committee of inspection shall vitiate any act done by him in good faith.

Based on r. 193, the court in *Sam Hin Timber (supra)* ruled that the premature swearing or affirming of such an affidavit verifying petition was a mere irregularity and curable thereunder. Similarly in *Sari Atlantic Sdn Bhd (supra)*, the court was of the view that apart from the discretionary power given by rr. 193 and 194, the Companies Act under s. 221(2) allows the court to cure the "technical error" which does no injustice to the respondent.

This was pleaded by the learned counsel for the petitioner in her submission on 22 February 1999.

Perhaps it is necessary to respectfully note at this stage that the Court of Appeal in *YPJE Consultancy Service Sdn Bhd (supra)* posed a pertinent point when the learned Ahmad Fairuz JCA at p. 492 said:

> A similar issue arises concerning the verifying affidavit which contained the same date as that in the petition. Is it just that the petition be dismissed only for the reason that the date was one which was not dated after a date stated in the petition when it was clear from the affidavit that the affidavit refers to that petition itself? (This fact is similar to the instant case).

This court will further add that apart from the authorities enumerated earlier, it may be necessary to restate what VC George J (as his Lordship was then) in *Re Mohd Sharif Bin Sapie (supra)* at p. 105, albeit *obiter dictum* that the very short judgment of Sir John Romilly which said thus:

a "This affidavit amounts to nothing; it must be resworn and the order dated subsequently". meant that clearly he found nothing wrong with the petition itself and was of the opinion that the omission of an affidavit sworn in terms required by the rule could be rectified by a reswearing of the affidavit and that the order sought by the petition could be made thereafter.

b It is therefore the view of this court that the premature swearing or affirming of the affidavit verifying petition on 26 November 1998 was a mere irregularity and curable by this court as no injustice has been caused to the company.

Vested with the powers under Companies (Winding-up) Rules 1972 and the Companies Act 1965 it is hereby ordered that the petitioner be allowed to *c* reaffirm or reswear the same affidavit within 10 days with costs to be paid by the petitioner to the company.

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